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JAMES R. BROWNING

In the Supreme Court

of the United States

OCTOBER TERM, 1960

No. ~~9218~~ 99

MORRISON-KNUDSEN COMPANY, INC.,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, U. S. Department of Labor, Bureau of Employee's Compensation, and DANA M. EMIG, for herself and on behalf of Susan Marie and Kristine Marie Emig,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-61

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J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, U. S. Department of Labor, Bureau of Employee's Compensation, and DANA M. EMIG, for herself and on behalf of Susan Marie and Kristine Marie Emig,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Idaho, Southern Division, affirming the order and award of the Deputy Commissioner of Labor awarding compensation under the Longshoremen's and Harbor Workers' Compensation Act and dismissing petitioner's petition for an injunction.

OPINIONS BELOW

The order and award of the Deputy Commissioner has not been reported but is printed in Appendix (c) hereto infra page 22.

The opinion of the District Court has not been reported but is printed in Appendix (b) hereto infra page 21.

The opinion of the Court of Appeals has not been reported and is printed in Appendix (a) hereto infra page 15.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered and filed the 20th of March, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

1. Is a party (employer) before the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act entitled to a trial de novo as a matter of right on the question of whether the injury or death of the claimant (employee) occurred upon navigable waters of the United States under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 920 (a).

2. Are seepage waters in an unused diversion tunnel below Idaho land and constructed incident to dam con-

struction upon navigable waters, themselves navigable waters within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 903(6).

3. Assuming for the purposes of argument only, that seepage waters in an unused diversion tunnel are in fact navigable waters of the United States, is the work performed incident to preventing such seepage into the unused diversion tunnel maritime employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 902 (4).

STATUTES INVOLVED

Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 903(a)) provides:

> "Compensation shall be payable under this chapter in respect to disability or death of an employee *but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for disability or death through Workmen's Compensation proceedings may not validly be provided by State law.*" (Emphasis added.)

Section 2(4) of the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C.A. 902(4) provides:

> The term "employer" means an employer any of whose employees are employed in maritime employment in whole or in part, upon the navigable waters of the United States (including any drydock)."

Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 920 provides:

> "In any proceeding for the enforcement of a claim

for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter."

STATEMENT OF THE CASE

This action (pursuant to 33 U.S.C.A. 921 (a, b) (Section 21)) seeks to enjoin the Deputy Commissioner of the Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, United States Department of Labor, Bureau of Employee's Compensation from awarding to the widows and other beneficiaries of certain employees of Morrison-Knudsen Company, Inc., compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq.

Actually this action involves four deaths which gave rise to five separate proceedings under the Longshoremen's and Harbor Workers' Compensation Act by the surviving widows and other beneficiaries and pursuant to stipulation the decision in this case is to be binding on the remaining four cases, which were also appealed.

The essential facts may be summarized as follows:

Decedent Emig was an ironworker employed by Morrison-Knudsen Company, Inc. in the course of the construction of the Brownlee Dam on the Snake River between the States of Oregon and Idaho. A diversion tunnel approximately 2,550 feet long in the shape of a modified horseshoe was bored into and through the bank of the

river on the Idaho side and the tunnel was some 400 feet below the surface of the Idaho land.

The diversion tunnel was constructed in order to divert the waters of the Snake River around the area in the bed of the stream where the dam was to be constructed.

Upon the completion of the Brownlee Dam the upstream end of the diversion tunnel was permanently blocked by the lowering of large concrete gates. This allowed waters of the Snake River to back up behind the dam so that eventually there was a pool or lake behind the dam and approximately 200 feet of water over the upstream entrance to the blocked diversion tunnel.

Although the contractor, Morrison-Knudsen Company, dumped considerable material at the upstream end of the diversion tunnel, water seeped and leaked into the tunnel, requiring further action by the contractor.

In order to investigate the leakage and seepage into the tunnel four ironworkers were dispatched into the tunnel, including the decedent Emig, and they were directed to proceed into the unused tunnel from the downstream end and attach brackets to the wall at the upper end of the tunnel. The four ironworkers proceeded into the tunnel in a 16-foot boat propelled by an outboard motor and in the course of this operation were drowned when the boat upset. The seepage water was eventually pumped out of the unused diversion tunnel and the tunnel was permanently sealed with concrete plug at about half way along its length.

Morrison-Knudsen Company, Inc., pursuant to the provisions of the Idaho Workmen's Compensation Act, made certain compensation payments to the widows and other beneficiaries of the deceased ironworkers. However, the widows and other beneficiaries filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

The claims were heard before the Deputy Commissioner for the Fourteenth Compensation District, who filed and entered orders allowing compensation under the Act to the widows and other beneficiaries of the deceased ironworkers.

Thereafter Morrison-Knudsen Company, Inc., filed petitions for injunctions in the United States District Court for the District of Idaho, Southern Division, together with motions for trial de novo and petitions for interlocutory injunctions in order to stay payments of compensation under the Act. The motions were denied by the United States District Court for the District of Idaho, Southern Division, although the District Judge indicated that he would have ruled differently from that of the Deputy Commissioner.

Thereafter Morrison-Knudsen Company, Inc., appealed the decisions of the United States District Court for the District of Idaho, Southern Division, to the Circuit Court of Appeals for the Ninth Circuit and the Appeals Court affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I

An important question of Federal Law has been decided by the Court below which has not been but should be settled by this Court.

There is a conflict between the decision of the Court below and the Court of Appeals for the Seventh Circuit in *Pittsburgh SS Co. v. Brown*, 171 F. 2d 175 (CA 7th).

The decision of the Court below decides a question of Federal Law which has not been, but should be settled by this Court, namely, "Is the substantial evidence rule, 33 U.S.C.A. 920, applicable to a Deputy Commissioner's finding of Constitutional Jurisdictional Fact under the Longshoremen's and Harbor Workers' Compensation Act or is the losing party (employer) before the Deputy Commissioner entitled to a trial de novo as a matter of right on such facts."

Crowell v. Benson, 285 U.S. 22, teaches that there are both Constitutional and Statutory Jurisdictional Facts prerequisite to the application of the Longshoremen's and Harbor Workers' Compensation Act. That opinion holds that there are two Constitutional Facts prerequisite to the application of the Act, namely, that a master-servant relationship exists and that the injury or death in question occurs on navigable waters of the United States. All other jurisdictional facts, such as course and scope of employment are merely

statutory. The Crowell decision, supra, holds that the substantial evidence rule is applicable to the Deputy Commisioner's finding of statutory jurisdictional facts but leaves open the question as to Constitutional jurisdictional facts:

> "* * * there is no violation of the purpose of Congress in sustaining the determination of fact that the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends. * * *"

The Court below specifically held that the substantial evidence rule may be constitutionally applied to the Deputy Commissioner's findings of Constitutional Jurisdictional fact. (Occurrence upon navigable waters of the United States) and thereby precludes the losing party's (employer) right to a trial de novo of such fact. The Court below stated:

> "Thus it can be said that as far as this Circuit is concerned the rule laid down in Crowell v. Benson, 285 U.S. 22, has been limited and interpreted so as not to require a trial de novo as a matter of right under the circumstances where there is no real issue of fact presented."

The decision of the Court below is novel and is in conflict with the spirit of Crowell v. Benson, supra. This Court has held many times that the substantial evidence rule may be constitutionally applied to the Deputy Commissioner's finding of statutory facts, but no decision of this Court has ever considered the question of whether the substantial evidence rule may be constitutionally applied to a Deputy Commissioner's findings of constitu-

tional jurisdictional fact. *O'Leary v. Brown Pacific Maxon,* 340 U.S. 504; *Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469; *Parker v. Motorboat Sales Co.,* 314 U.S. 244; *Voehl v. Indemnity Ins. Co.,* 288 U.S. 162.

This question should be decided by this Court in order to assist in the orderly administration of the Longshoremen's and Harborworkers' Compensation Act.

The decision of the Court below is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *Pittsburgh SS Co v. Brown,* 171 F. 2d 175 (C.A. 7). In that case the Court of Appeals for the Seventh Circuit affirmed the action of the trial Court in granting the losing party a trial de novo on the question of whether the injury occurred upon navigable waters of the United States. In so holding the Seventh Circuit reviewed *Crowell v. Benson,* supra, and that decision's distinction between constitutional and statutory jurisdictional facts. The Seventh Circuit affirmed the principle that the substantial evidence rule may be applied to the Deputy Commissioner's findings of statutory jurisdicitional fact. However, the Seventh Circuit recognized that the substantial evidence rule may not be applied to a finding of Constitutional jurisdictional facts and that the losing party is entitled to a trial de novo as a matter of right as to such findings. The Seventh Circuit reviewed the long line of cases which have supposedly destroyed the rule in Crowell v. Benson, supra, and noted at page 177:

> "A study of these cases, however, makes it plain that neither of the constitutional jurisdictional questions which the Court considered in the Crowell case was involved."

None of the case relied on by the Court below furnish any substantial basis for the contention that the Crowell case, supra, is no longer binding upon inferior Federal Courts.

Thus a conflict exists between two Circuits involving an important question of Federal Statutory interpretation which should be settled once and for all by this Court.

II

An important question as to the proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act is directly presented: There is a conflict between the decision of the Court below and the Court of Appeals for the Second Circuit in *Jeffers v. Foundation* Co., 85 F. 2d 24. (C.A. 2).

The opinion of the Court below holds that water which seeps from a navigable stream into an unused diversion tunnel used in the construction of a dam across a navigable stream is in itself navigable water of the United States within the meaning of 33 U.S.C.A. 903; that death resulting on those seepage waters is compensable under the Longshoremen's and Harbor Workers' Compensation Act. This decision is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Jeffers v. Foundation Company,* 85 F. 2d 24 (C.A. 2). In the Jeffers case, supra, a diver was injured by a blast prematurely fired while he was standing either on a ladder or a raft floating upon waters which had seeped into a cofferdam. Cofferdams and caissons had been constructed in order to prepare the foundation of a bridge across the Ohio River

at Pittsburgh, admittedly navigable waters of the United States. A cofferdam had been placed in the river upon a concrete foundation. The base of the cofferdam was below the surface of the river and the top of the cofferdam was above the surface of the river.

The employee left the safety of the cofferdam to set a charge of dynamite in the river and had returned to the interior of the cofferdam when the explosion occurred.

The Court of Appeals for the Second Circuit held that the waters within the cofferdam had been withdrawn from the navigable portions of the Ohio River and no longer formed a part of that river and that therefore the injury to the employee did not occur upon navigable waters of the United States and therefore the Longshoremen's and Harbor Workers' Compensation Act was inapplicable; accord *American Red Cross v. Henson*, 122 S.W. 2d 433.

The waters in the cofferdam obviously did not meet the test of navigability laid down in the *Daniel Ball*, 770 U.S. 557, and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377.

The waters that had leaked into the unused diversion tunnel from the Snake River did not "form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water" as required by the decisions in the Daniel Ball and United States v. Appalachian Power Co., supra.

A conflict exists between the decision of the Court below and the decision of the Court of Appeals for the Second Circuit in the Jeffers case, supra. The fact parallels between the two cases are obvious. An important question of Federal Statutory interpretation exists which should to settled once and for all by this Court, namely: Whether withdrawn seepage waters from a navigable stream should or should not be treated as navigable waters of the United States for the purpose of the application of the Longshoremen's and Harbor Workers' Compensation Act.

III

An important question as to the proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act is directly presented: There is a possible conflict between the decision of the Court below and the Court of Appeals for the Eighth Circuit in *Massman Construction* Co. v. *Bassett*, 120 F. 2d 230 (C.A. 8), certiorari denied 314 U.S. 648.

Dam construction on the navigable streams of the United States is of considerable importance to the entire country and to the various States and contractors who are concerned or engaged in such construction. This is particularly so in the Pacific Northwest.

The decision of the Court below concludes that employees engaged in the construction of a dam who are required to investigate seepage waters in an unused diversion tunnel are engaged in maritime employment. According to the Court below workers engaged in such

work are within the purview of the provisions of the Longshoremen's and Harbor Workers' Compensation Act. This decision is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Massman Construction Co. v. Bassett*, 30 F.S. 813, 120 F. 2d 230 (C.A. 8), Certiorari denied, 314 U.S. 648.

In the Massman case, supra, decedent received fatal injuries while standing in the bottom of a cofferdam erected in aid of the construction of a dam in navigable waters. A decree was entered enjoining enforcement of the Deputy Commissioner's award for the reason that at the time of the decedent's injuries he was not engaged in maritime employment upon navigable waters of the United States. 30 F. Supp. 813. The Court of Appeals for the Eighth Circuit reversed for jurisdictional reasons admittedly not considering the essential constitutional jurisdictional fact as to navigable waters of the United States as considered by the trial Court and found to be wanting.

For a similar decision to the effect that the construction of a dam in navigable waters of the United States is not maritime employment see *Central Engineering Co. v. Bassett* (D.C. Ill. 1941), 42 F. Supp. 750.

The decision of the Court below is in direct conflict with the *Massman* and *Central Engineering Co.* cases and an important federal question is raised which should be settled once and for all by this Court, namely: Whether drownings of ironworkers, on seepage water from a navigable stream, in an unused diversion tunnel are compensable under the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION

The questions presented are of considerable importance and will undoubtedly be precedents in many other Longshoremen's and Harbor Workers' Compensation Act cases involving dam construction.

The decision of the Court below makes a nullity of the provision of 33 U.S.C.A. 903(a) reading:

> "* * * and if recovery for disability of death through Workmen's Compensation proceedings may not be provided by State law."

The employer, Morrison-Knudsen Company, Inc., has a constitutional right of trial de novo on the constitutional jurisdictional fact of whether or not the deaths occurred on navigable waters of the United States. Seepage waters into an unused diversion tunnel are not navigable waters of the United States as a matter of law and ironworkers who may sustain injury or death while working on such seepage waters are not engaged in maritime employment so as to come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

To resolve the conflict between the various Court of Appeals and to furnish an authoritative guide for future anticipated litigation involving the same questions, this petition for writ of certeriorari should be granted.

Respectfully submitted,

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Portland 4, Oregon,
Attorney for Petitioner.

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16896 – MARCH 20, 1961 – WOLLENBERG, DISTRICT JUDGE

This case involves the death of four workmen employed by appellant in the construction of the Brownlee Dam on the Snake River, which at the point of construction runs between the states of Idaho and Oregon. The dam construction was authorized by the Federal Power Commission "in the interest of navigation".

During construction a diversion tunnel was constructed; this tunnel took the entire flow of the Snake River from its normal channel and carried it around the dam site during the period of construction of the dam itself. This tunnel, for several months, was the actual bed of the stream. Later, gates with open grilles were placed at the upstream entrance of the tunnel to allow a portion of the water to flow to the dam, and thus build up a pool behind the dam, at the same time allowing a portion of the water to go into the river via the tunnel, and thus maintain the downstream flow of the Snake River. This continued until the level of water behind the dam became sufficiently high so that the required water could pass downstream via the spillway of the dam. When this occurred the appellant attempted to close the tunnel flow of water by blocking off the grilles at the tunnel entrance by dumping rock and fill. This process of dumping was eventually designed to close off the entire flow of water into the tunnel. At the time of the deaths, approximately

one-twentieth of the entire river water continued to flow into the tunnel by seeping through the rock fill.

The four deceased workmen had entered the diversion tunnel in a boat to accomplish work eventually designed to effect a complete closing off of the flow of all waters into the tunnel. It was while engaged in this work that the four workmen lost their lives by drowning.

The deputy commissioner, on these facts, after hearing awarded payments under the Longshoremen's and Harbor Workers' Compensation Act to the claimants. He specifically found the deaths arose out of the workers' employment, that a portion of the Snake River, a navigable body of water, was flowing through the diversion tunnel at the time of the accident, that appellant contractors used a number of boats during construction of the dam, and that the claims herein were timely filed. The appellant then filed in the United States District Court for the District of Idaho a "Petition for Injunction". This petition sought a decree holding the commissioner's compensation order unlawful, and setting it aside, and enjoining its enforcement. The United States District Court denied a motion for a trial de novo and denied the relief sought, affirming the award of the deputy commissioner as supported by substantial evidence.

(1) Appellant contends that the trial court erred in denying it a trial de novo.

It agrees that the record before the deputy commissioner is complete and contains all of the evidence that could be adduced at any hearing on this case; in other words, a de novo hearing before the reviewing court would

have produced no more factually than the court had before it in the record of hearing before the deputy commissioner. There is, therefore, no showing that any worthwhile purpose would have been served by a hearing de novo in the district court on review of the commissioner's order.

This court has on two occasions refused to require de novo hearings on review, and in each case has refused to distinguish between questions of fact that may be said to be "fundamental" or "jurisdictional". Thus it can be said that as far as this Circuit is concerned the rule laid down in *Crowell v. Benson,* 285 U.S. 22, has been limited and interpreted so as not to require a trial de novo as a matter of right under circumstances where there is no real issue of fact presented. Rather, this court has consistently held that where no worthwhile purpose would be served, the substantial evidence rule should be applied, and if there is such evidence upon which to sustain the deputy commissioner's findings, his conclusions should be sustained. Clearly, there is no showing under the present modern authorities that appellant was entitled to a hearing de novo as a matter of right under the circumstances herein.

> *O'Leary v. Dielschneider,* 204 F.2d 810 (C.C.A. 9); *Western Boat Building Co. v. O'Leary,* 198 F.2d 409 (C.C.A. 9).

The District Judge adopted, and we believe correctly, the substantial evidence rule, and reviewed the record before the deputy commissioner. This he had a right to do, and clearly he committed no error in proceeding to a determination of the issues upon that record without a de novo trial.

(2) It is contended by appellant that the court erred in holding that the employees' deaths resulted from injuries occurring upon navigable waters of the United States, and were thus subject to the Longshoremen's and Harbor Workers' Compensation Act.

There can be no doubt, from a reading of the record herein, that the waters of the Snake River are navigable waters. The facts disclose that the purpose of the tunnel in question was to accommodate these waters during the construction of the dam; that for a period of many months all of the waters of the Snake River flowed through the tunnel, and thus the tunnel became the stream bed of the river. At the time of the accident, although an attempt had been made to prevent the flow of any of the water from the river into the tunnel, yet a considerable amount of this river flowed into the tunnel as leakage. This did not change the navigable nature of the waters in the tunnel; man made works, although artificial, have not, under these facts, changed the character of the waters of the Snake River, and particularly the character of the water in the diversion tunnel; the waters in the tunnel were at the time of the accident navigable waters of the Snake River.

(3) Appellant contends that there is nothing in the evidence remotely connected with maritime employment, which would make the deaths compensable under the Longshoremen's and Harbor Workers' Compensation Act.

The deaths occurred on navigable waters, i.e., the Snake River, at a time that the deceased dam workers were operating a boat on these waters. The appellant

was constructing the dam, on the navigable Snake River, under an authorization from the Federal Power Commission "in the interest of navigation". The fact that the deceased were dam workers is not determinative herein; these men, under the facts, were engaged in a pursuit directly concerned with a maritime purpose; they were concerned, as was their employer, with an occupation directly affecting the flow of navigable waters of the Snake River. At the time of their deaths they were engaged in a maritime pursuit on navigable waters of the United States. The work they were doing, from a boat floating on waters of the Snake River, at the time of their deaths, directly concerned the flow of the waters of the river, i.e., navigable waters, to prevent seepage into the tunnel of waters from a navigable stream. The tunnel in which they were working had some months before carried all the waters of this stream, and during this period was the main stream bed. At the time of the deaths, it still carried a portion of these waters, and it was this fact that necessitated the presence of the workers in the tunnel in order that the tunnel be plugged and all of the water of the stream be returned to a single channel.

Under the facts herein, at the specific time and place both employer and employees were engaged in maritime employment.

This conclusion of the deputy commissioner is adequately sustained in the record by substantial evidence, and the District Judge so found. The fact that the evidence may have supported a contrary finding, or that the weight of the evidence may be contra, is not sufficient

to overcome the substantial evidence rule as applied by the District Judge. *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251.

It is therefore ordered:

(1) That judgment of the United States District Court be affirmed.

(2) That counsel fees for services on this appeal be paid to Bailey, Lezak, Swink and Gates, of Portland, Oregon, attorneys for intervenor, in the sum of $150.00, to be paid from the award to claimants herein.

(Endorsed) Opinion Filed March 20, 1961.

Frank H. Schmid, Clerk.

APPENDIX B

OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO – SOUTHERN DIVISION MARCH 21, 1960 – CLARK, DISTRICT JUDGE

THE COURT: I have hastily drawn a little memorandum.

It cannot be questioned that the Snake River itself is a navigable stream and the waters of the Snake River are navigable waters of the United States.

In a proceeding such as this for compensation under the Longshoremen and Harbor Workers Compensation Act the Court is to accept the findings of the Deputy Commissioner unless they are unsupported by substantial evidence on the record considered as a whole.

Although I might say that I don't agree with the conclusions reached by the Commissioner, nevertheless he was the fact finder and I will sustain his decision.

I feel that this action has been instituted on reasonable grounds and costs will not be allowed.

APPENDIX C

BUREAU OF EMPLOYEES' COMPENSATION
U. S. DEPARTMENT OF LABOR

FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act
DANA M. EMIG (RICHARD B. EMIG, DECEASED),
Claimant,

vs.

MORRISON-KNUDSEN COMPANY, INCORPORATED,
Uninsured Employer.

COMPENSATION ORDER
AWARD OF DEATH BENEFITS

CASE NO. 1793-4

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 22nd day of July, 1958, the deceased above named was in the employ of the employer above named at Brownlee Dam located in the Snake River, a navigable body of water between the States of Idaho and Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was un-

insured; that in connection with the construction of the Brownlee Dam it was necessary for the employer to divert the flow of the Snake River away from the dam site and for this purpose the employer constructed a diversion tunnel through which the Snake River flowed while the Brownlee Dam was being constructed; that after the dam was completed a portion of the Snake River continued to flow through the diversion tunnel and on July 22, 1958 the deceased and three other employees who were performing service as iron workers for the employer were directed to proceed into the tunnel and attach certain brackets to the wall of the upper end of the tunnel to aid in sealing off the tunnel so that it would no longer carry a portion of the flow of the Snake River; that the deceased and the three other employees proceeded into the diversion tunnel in a 16-foot boat which was propelled by an outboard motor; that while the deceased and the three other employees were in the tunnel the boat in which they were riding was broken up in consequence of which the deceased and his three fellow employees were drowned; that the death of the deceased arose out of and in the course of his employment by the employer above named; that during the construction of the Brownlee Dam the employer operated 10 to 12 boats propelled by outboard motors and similar in size to the boat in which the deceased was a passenger on the date of his death; that these boats were used to transport employees of the employer across the Snake River and in various other activities; that in addition to these boats the employer also operated a tug boat about 33 or 34 feet in length which was used in connection with the construc-

tion of a fish net some distance upstream from the dam site; that written notice of death was not given within 30 days but that the employer had knowledge of the death and was not prejudiced by the lack of such written notice; that a claim for death benefits was not filed by the claimant herein within one year after the date of the death of the deceased but since the employer has failed to submit a report of the death in accordance with the provisions of Section 30 (a) of the Act, the time limitation for the filing of a claim in subdivision (a) of Section 13 of the Act did not begin to run against the claim of the claimant herein and her claim for death benefits filed May 26, 1959 was timely filed; that the average weekly wage of the deceased employee at the time of his death is admitted to have exceeded $81.00; that the claimant, Dana M. Emig, who was born on September 14, 1925 and married to the deceased on January 1, 1946 is the surviving wife of the deceased and as such is entitled to death benefits for her support at the rate of $28.35 per week; that Susan Marie Emig, who was born on February 12, 1949, and Kristine Marie Emig, who was born on January 26, 1955, are the surviving children of the deceased and as such are entitled to death benefits at the rate of $12.15 each per week; that said death benefits are payable to Dana M. Emig as Mother and natural guardian of said surviving children; that the accrued death benefits to which the claimant, Dana M. Emig, is entitled to for her support and for the support of said surviving children from July 23, 1958 to January 26, 1960, inclusive, a period of 79 weeks at $52.65 per week, amount to $4,159.35; that the claimant has paid $1,289.65 as funeral

expenses of the deceased and she is entitled to reimbursement in the amount of $400.00 as reasonable funeral expenses; that the employer is entitled to credit for any amounts heretofore paid to the claimant as death benefits or reimbursement of funeral expenses in accordance with the provisions of the Idaho Workmen's Compensation Law.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD

That the employer, Morrison-Knudsen Company, Incorporated, shall pay to the claimant, Dana M. Emig, death benefits for her support, and for the support of Susan Marie and Kristine Marie Emig, surviving children of the deceased as follows: 79 weeks at $52.65 per week in the amount of $4,159.35 from July 23, 1958 to January 26, 1960, inclusive, which amount the employer is directed to pay forthwith in one sum (less any payments of death benefits heretofore made by the employer in accordance with the provisions of the Idaho Workmen's Compensation Law and also less attorneys' fees hereinafter provided for) and shall thereafter continue payments of death benefits to Dana M. Emig at the rate of $52.65 per week for her support and for the support of said surviving children in bi-weekly instalments subject to the limitations of the Act or until otherwise ordered. The employer shall also reimburse the claimant, Dana M. Emig, for reasonable funeral expenses of the deceased in the amount of $400.00 (less any payment of funeral

expenses heretofore paid by the employer). A fee in the amount of $500.00 is hereby approved in favor of Bailey, Lezak, Swink and Gates, Attorneys at Law, 617 Corbett Building, Portland 4, Oregon, for services rendered the claimant in the presentation of her claim for death benefits, the same to constitute a lien upon and be payable from this award.

Given under my hand at Seattle, Washington, this 26th day of January, 1960.

J. J. O'LEARY,
Deputy Commissioner,
Fourteenth Compensation District.

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act
DANA M. EMIG (RICHARD B. EMIG, DECEASED),
Claimant,

VS.

MORRISON-KNUDSEN COMPANY, INCORPORATED,
Uninsured Employer.

SUPPLEMENTAL COMPENSATION ORDER
CORRECTING COMPENSATION ORDER FILED JANUARY 26, 1960
CASE NO. 1793-4

Upon his own initiative, because of a mistake in a determination of fact by the Deputy Commissioner, the Deputy Commissioner has reviewed the compensation

order filed in the above entitled case on January 26, 1960 and finds that the following **FINDING OF FACT** contained in said compensation order was incorrect; "that a claim for death benefits was not filed by the claimant herein within one year after the date of the death of the deceased but since the employer has failed to submit a report of the death in accordance with the provisions of Section 30 (a) of the Act, the time limitation for the filing of a claim in subdivision (a) of Section 13 of the Act did not begin to run against the claim of the claimant herein and her claim for death benefits filed May 26, 1959 was timely filed"; accordingly, — the above **FINDING OF FACT** in said compensation order is hereby deleted and the following **FINDING OF FACT** is substituted in lieu thereof: — "that the claim for death benefits filed by the claimant herein on May 26, 1959 was filed within one year after the date of the death of the deceased."

Given under my hand at Seattle, Washington, this 20th day of January, 1960.

J. J. O'LEARY,
Deputy Commissioner,
Fourteenth Compensation District.

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No. 97

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In the Supreme Court of the United States

October Term, 1961

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

J. J. O'CONNELL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 978

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B, 21) is not reported. The opinion of the court of appeals (Pet. App. A, 15–20) is reported at 258 F. 2d 542.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1961. The petition for a writ of certiorari was filed on May 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this proceeding to review a compensation award of the Deputy Com-

missioner under the Longshoremen's and Harbor Workers' Compensation Act, the employer was entitled to a trial de novo in the district court on the issue whether the deaths occurred upon navigable waters.

2. Whether the courts below correctly found that there was substantial evidence to support the Deputy Commissioner's findings that, at the time of their death, the employees were engaged in maritime employment on a navigable water.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) provides in pertinent part:

Sec. 2(4) [33 U.S.C. 902(4)]:

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

Sec. 3(a) [33 U.S.C. 903(a)]:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

Sec. 20 [33 U.S.C. 920]:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.
>
> (b) That sufficient notice of such claim has been given.
>
> (c) That the injury was not occasioned solely by the intoxication of the injured employee.
>
> (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

STATEMENT

This is a proceeding under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, *et seq.*, to obtain review of an order of the respondent Deputy Commissioner awarding compensation for the death of four employees of petitioner, Morrison-Knudsen Company, Inc. The accident occurred at the Brownlee Dam site located on the Snake River, which is a navigable stream constituting the boundary between the States of Idaho and Oregon. The Brownlee Dam is the first of three being constructed to improve navigation on the Snake River and to develop hydroelectric power for the area (R. 54–57).[1] The undisputed facts, adduced in the administrative hearing, are as follows:

In the process of constructing the Brownlee Dam, a diversion tunnel was built to detour the entire flow

[1] "R." refers to the transcript of record in the court below.

of the Snake River from its normal channel around the site where the dam was being erected (R. 70). The tunnel was hollowed out of the bank of the river on the Idaho side, and was 2,555 feet in length (R. 71–72). The river was run through this tunnel for several months and, during that period, the diversion tunnel was the actual bed of the stream (R. 74).

On May 9, 1958, in order to permit the back-up pool behind the dam to build up and at the same time allow a portion of the river to continue to run through the tunnel (R. 74–75), large concrete gates with open grills were placed at the upstream end (R. 72).[2] After the pool was sufficiently large and the required flow of water was passing through the spillway of the dam, petitioner attempted to block off the grills in the gates with rocks and fill. This was done so that all of the water of the Snake River would pass through the spillways and hydroelectric penstocks of the Brownlee Dam (R. 107). At the time of the deaths in question, roughly one-twentieth of the flow of the river continued to pass through the tunnel (R. 76).[3]

On July 22, 1958, decedents were sent by boat into the diversion tunnel to assist in closing off the flow of water (R. 75). The four men were provided with one of several 16-foot wooden boats available for use in the tunnel (R. 78–79, 87–89). While in the

[2] Petitioner was required to maintain a minimum flow of 5,000 feet per second in the river and the grills were designed to accomplish this.

[3] Between 500 and 600 feet per second were passing through the tunnel and between 10,000 and 11,000 feet per second were passing over and through the dam.

tunnel, and from unknown causes, the boat in which the four men were riding was broken up and all of them were drowned (R. 87–88).

The tunnel was easily and frequently navigated in 16-foot boats (R. 90, 117–118, 135–136), and could be and had been traversed its entire length up to the gates (R. 88). There was a slight downstream current in the tunnel estimated at half a mile an hour (R. 118, 135). Workmen were able to spend a full work day in the tunnel without discomfort (R. 136–137).

Following the hearing, the Deputy Commissioner issued a Compensation Order on January 26, 1960, in which he substantially recited the above facts and awarded payments to claimants (Pet. App. C, 22–26; R. 10–14). On February 9, 1960, petitioner filed this action in the district court (R. 3), to obtain review of the administrative order. The district court, on March 4, 1960, denied motions by petitioner for a trial de novo of the issue of whether the deaths occurred on navigable waters and for an interlocutory injunction (R. 23), and, on March 24, 1960, affirmed the award as supported by substantial evidence (R. 30–31). The court of appeals affirmed (Pet. App. A, 20).

ARGUMENT

The court of appeals held (1) that petitioner was not entitled to a trial de novo where, as the court was convinced here, the record before the Deputy Commissioner was complete, and therefore no worthwhile purpose would have been served by a hearing de novo; and (2) that the Deputy Commissioner's find-

ings that the deaths occurred on navigable waters and that decedents were engaged in maritime employment were supported by substantial evidence (Pet. App. A, 15–20). These holdings are plainly correct. Moreover, the case raises no question of general importance, but turns on the particular circumstances presented. Further review by this Court is therefore not warranted.

1. It has been established by this Court that a river is navigable in law, if it is navigable in fact. *The Daniel Ball,* 77 U.S. 557, 563; *Oklahoma* v. *Texas,* 258 U.S. 574, 585, 590–591; *Arizona* v. *California,* 283 U.S. 423, 452–453. Thus, the question as to the navigability of a particular stream, or segment thereof, is essentially factual in nature. *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 403–404; *United States* v. *Utah,* 283 U.S. 64, 87. Since Section 2(4) of the Longshoremen's and Harbor Workers' Act, *supra,* p. 2, provides that compensation shall be payable only if the injury producing disability or death was sustained upon navigable waters, it is the duty of the Deputy Commissioner, in determining the propriety of a claim, to determine from the basic facts the navigability of the stream upon which an injury was allegedly sustained. See *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U.S. 469, 477.

On the basis of this Court's opinion in *Crowell* v. *Benson,* 285 U.S. 22, petitioner contends (Pet. 7–10) that it was entitled to a trial de novo in the district court as a matter of right on this factual issue. In *Crowell,* the Court held that the question of whether the claimant was an employee involved a "funda-

mental or jurisdictional" determination of fact on a condition indispensable to the application of the Longshoremen's and Harbor Workers' Act, and added, by way of dictum, that the issue of navigability is in the same category. 285 U.S. at 54–65. While the Court suggested that "the Federal court should determine [the] issue [of employment] upon its own record and the facts elicited before it" (*id.* at 64), the precise holding was simply that the district court had not erred in "permitting" a trial de novo on that issue (*id.* at 65.) We do not think that this holding can be taken to mean that, where, as here, it is undisputed that the record before the Deputy Commissioner contains all of the relevant evidence on the factual issue, the district court must nevertheless receive that same evidence in a trial de novo. For clearly a trial de novo on facts already established by the extensive administrative hearings would greatly increase the expenses of the widows and children claiming under the Act and would frustrate the statutory purpose of providing a prompt and inexpensive method of adjudicating compensation claims.[4]

Moreover, the *Crowell* case was decided prior to the enactment of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, which governs the scope of review in this case. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. The governing rule now is that the judicial function "is exhausted when it becomes evident that the Deputy

[4] The express terms of the Longshoremen's Act also militate against any broader review. Section 19 of the Act, 33 U.S.C. 919, providing for the filing of a "claim for compensation,"

Commissioner's choice has substantial roots in the evidence and is not forbidden by the law." *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 478. See also *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, *supra*. Thus, the only question properly before the reviewing court is whether there is factual and legal support for the Deputy Commissioner's conclusion. Once there is "found to be a rational basis for the conclusions approved by the administrative body," the judicial function is exhausted. *Mississippi Valley Barge Line Company* v. *United States*, 292 U.S. 282, 287; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469; *Parker* v. *Motor Boat Sales Co.*, 314 U.S. 244.

Following this rule, this Court has held that de novo review is not required under the Longshoremen's Act on the issue whether an injury occurred in the course of employment (*Cardillo* v. *Liberty Mutual Ins. Co.*, *supra*; *Parker* v. *Motor Boat Sales Co.*, *supra*; *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162), whether the claimant was a dependent of the deceased (*L'Hote* v. *Crowell*, 286 U.S. 528; *The Admiral Peoples*, 295 U.S. 649, 653–654), whether a death was a suicide (*Del Vecchio* v. *Bowers*, 296 U.S. 280), and whether an employee was a member of a crew and

---

specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Section 20(a), 33 U.S.C. 920(a), requires that claims be treated as presumptively within the protection of the Act. And Section 21(b), 33 U.S.C. 921(b), provides that a compensation order may be set aside by a federal district court only "[i]f not in accordance with law."

therefore was within the Act's protection (*South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251). Additionally, prior to this case, the Court of Appeals for the Ninth Circuit twice held that, where there is no substantial issue of fact presented, a party is not entitled to a trial de novo on the issue of navigability. *O'Leary* v. *Dielschneider,* 204 F. 2d 810; *Western Boat Building Co.* v. *O'Leary,* 198 F. 2d 409, 412.

Pittsburgh S.S. Co. v. *Brown,* 171 F. 2d 175, 178 (C.A. 7), on which petitioner relies (Pet. 9), is not to the contrary. The Seventh Circuit did not hold that one is entitled to a trial de novo on the navigability issue in all circumstances and as a matter of right, but only that a trial de novo can be granted or denied in the discretion of the trial court.

2. The district court and court of appeals were clearly correct in holding that there was substantial evidence to support the administrative findings that the deaths involved here occurred on navigable waters of the United States and that decedents were employed in "maritime employment."

(*a*) There is no merit to petitioner's contention (Pet. 10–12) that the waters of the Snake River running through the large diversion tunnel during the construction of the Brownlee Dam were not navigable.

This Court expressly recognized in *Scott* v. *Lattig,* 227 U.S. 229, 239, 242, 243, that the Snake River is a navigable water of the United States. The navigability of the Snake River is not changed merely because its waters were run through a tunnel. For it is established that both natural waterways which

have been artificially altered in furtherance of navigation and artificially created waterways may be deemed navigable waters of the United States within the maritime jurisdiction even when located solely in one state. *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263; *The Robert W. Parsons,* 191 U.S. 17; *Ex parte Boyer,* 109 U.S. 629; *The Lucky Lindy,* 76 F. 2d 561 (C.A. 5); *The Gerald A. Fagan,* 49 F. 2d 215 (C.A. 2), affirmed *sub nom. Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263.

Moreover, the gate and filling at the upstream end of the tunnel did not defeat navigability since this Court has held that navigability is not impaired by such obstructions as falls, rapids, sand bars, carries, or swift currents. *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 408–409; *Economy Light Co.* v. *United States,* 256 U.S. 113, 122; *United States* v. *Utah,* 283 U.S. 64, 86. Once a waterway has been declared navigable in law, as was the Snake River, admiralty jurisdiction over it is not destroyed because the waterway is interrupted by obstructions. *Economy Light Co.* v. *United States, supra.* Thus, although navigability implies the concept of a highway of commerce, that highway need not be an unimpeded stream. This is particularly true when, as here, the obstruction is created in order to increase capacity for navigation. *The Montello,* 20 Wall. 430.

As noted above (p. 6), it is settled that waters which are navigable in fact are navigable in law. There is no question but that the water passing through the terminal at the time of the accident was

in fact navigable. For a period of several months, the diversion tunnel was the actual bed of the navigable river. At the time of the accident, a considerable portion of the river (one twentieth of the entire flow—500 to 600 cubic feet per second) was continuing to flow through the tunnel. The evidence before the Deputy Commissioner showed that the terminal was 38 feet wide and about 42 feet high (R. 71–72), was sufficiently ventilated to allow persons to work indefinitely inside (R. 136–137), and, in short, was easily navigated (R. 117, 118, 135). In fact, at the time of the accident, decedents were proceeding upstream in the tunnel in one of several 16-foot boats which had consistently been used for this purpose (R. 78, 87–88, 90–91, 117–118, 135–136).[5]

(*b*) Petitioner contends (Pet. 12–14) that, because the decedents were dam workers, their work was not connected with maritime employment at the time of their deaths. However, this Court has determined that the critical factor is the nature of the work being performed at the time of the accident and not the employer's general employment. If the employment at that time is maritime, it is covered by the Longshoremen's Act—irrespective of whether the employee's usual employment was on land. *Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334; *Nogueira* v. *New York, N.H. & H. R. Co.,* 281 U.S. 128, 137; *Senko* v. *La-*

[5] *Jeffers* v. *Foundation Co.*, 85 F. 2d 24 (C.A. 2), upon which petitioner relies, is clearly distinguishable from this case. In *Jeffers* a diver, who was employed to aid in building the foundation for a pier of a bridge, was injured while inside a cofferdam.

Crosse Dredging Corp., 352 U.S. 370; *Northern Coal Co.* v. *Strand*, 278 U.S. 142, 144; *Liability Assurance Co.* v. *Cook*, 281 U.S. 233, 236. For example, in the *O'Rourke* case the Act was held applicable to a railroad employee temporarily working on navigable waters.[6]

In the case at bar, the injury occurred when the decedents in the course of their employment were navigating a 16-foot boat through a navigable part of the Snake River for the purpose of sealing off this part of the navigable stream. Such an activity is clearly maritime. The fact that petitioner had not previously performed such duties is totally immaterial. As in *O'Rourke*, the claims at issue here are compensable under the Act.[7]

The cofferdam was erected to cut off completely the waters of the Ohio river and expose the river bottom so as to permit the laying of the bridge foundation. It was not built to divert the bed of the river. Thus, the injury in *Jeffers* occurred in a structure which was an obstruction to navigation and not an aid, as was the tunnel here.

[6] In the *O'Rourke* opinion, the Court described various types of construction and service workers who were covered by the Act even though they were "obviously not themselves engaged in traditional 'maritime employment' if one were to look solely to the particular type of job they were engaged for." 344 U.S. at 341.

[7] *Massman Construction Co.* v. *Bassett*, 30 F. Supp. 813 (E.D. Mo.), reversed on other grounds, 120 F. 2d 230 (C.A. 8), certiorari denied, 314 U.S. 648, creates no conflict with the decision of the court below, in that (1) it is a decision of a district court and (2) it is distinguishable on its facts. The fatal injuries, as in the *Jeffers* case, *supra*, were sustained by a person who was working in a cofferdam and was in no way upon navigable waters.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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WILLIAM H. ORRICK, JR.,
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Attorneys.

JUNE 1961.

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No. 99

In the Supreme Court of the United States

OCTOBER TERM, 1961

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[redacted]

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 99

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT DEPUTY COMMISSIONER

On June 19, 1961, the government filed a brief for the respondent Deputy Commissioner in opposition to the petition for a writ of certiorari in this case. Subsequently, on July 13, 1961, the United States Court of Appeals for the Fifth Circuit handed down its opinions in *Travelers Ins. Co., et al.* v. *Calbeck, Deputy Commissioner, et al.* (C.A. 5, No. 18802), and *Avondale Shipyards, Inc.* v. *Donovan, Deputy Commissioner, et al.* (C.A. 5, No. 18695), holding that an employee may not receive compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) for an injury occurring

upon navigable waters while he was engaged in the construction of an uncompleted vessel, although his employer had numerous workers engaged in maritime employment upon navigable waters. Those opinions are set forth in the Appendix, *infra*, p. 3.

The government has just determined to file a petition for a writ of certiorari on behalf of the Deputy Commissioners in the two Fifth Circuit cases, and has begun preparation of a petition. Although the precise issue presented there is not raised by the petition in No. 99, a conflict in principle may arguably exist between the holding of the Ninth Circuit in No. 99 and the holdings of the Fifth Circuit in *Travelers Insurance*, and *Avondale Shipyards, supra.* In our view, any such conflict in principle would not in any way detract from the soundness and correctness of the Ninth Circuit's opinion and decision, in No. 99. Nevertheless, we bring the two Fifth Circuit decisions to the attention of the Court at this time so that the Court may consider whether it wishes to defer action on the petition in No. 99 until it can pass on the petition to be filed in the two Fifth Circuit cases.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1961.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY, APPELLANTS

v.

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

(July 13, 1961)

Before CAMERON, BROWN and WISDOM, Circuit Judges

BROWN, Circuit Judge: We have again the old, old contest: is the claim for injuries to an amphibious worker under the State Compensation Act? Or is it under the Federal Act?[1] Phrasing it differently, the question is all embracing. As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make

[1] Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§ 901–950.

twilight out of that which has been thought to be as clear as day or as black as night?[2] Specifically the question presented is whether a person injured while working on an uncompleted vessel then launched and afloat in navigable waters, but still under construction, is covered by the State Act, or the Longshoremen's Act, or perhaps either one or both depending on the injured party's ultimate choice under the "first-come-first-served"[3] Twilight Zone option?

Again, as we remarked before, "the facts, strikingly simple, neither complex nor conflicting, are not the cause of bewilderment." *Flowers* v. *Travelers Ins. Co.*, 5 Cir., 1958, 258 F. 2d 220 at 221. The Employer operates a shipyard on the Sabine River. At the shipyard it builds new vessels and also repairs completed ships. Its employees, including welders, perform work both on repairs and on construction. There is constant interchange between the two types of work. The Employee McGuyer on July 15, 1957, was injured while working on an oil drilling barge then under construction. The barge had been launched and the superstructure was being built. While McGuyer was welding on the port side of the deck, a tank exploded causing severe head injuries from which he died three days later. The drilling barge had never been used in navigation, and there

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[2] By rare coincidence the identical question is before us in a separate case from a different district. Argued and submitted on the same day, it has been decided this day. *Avondale Shipyards, Inc.* v. *P. J. Donovan, Deputy Commissioner*, 5 Cir., 1961, — F. 2d —, —, AMC — [No. 18,695].

[3] *Davis* v. *Department of Labor of Washington*, 1942. 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, was so characterized in *De Bardeleben Coal Corp.* v. *Henderson*, 5 Cir., 1944, 142 F. 2d 481 at 483.

was still substantial work to be done before it could be so utilized.

In proceedings before the Deputy Commissioner[4] the original Compensation Order made on February 18, 1959, rejected the claim for death benefits filed by the widow and children. The Deputy Commissioner went right to the heart of the matter. As the reason for rejecting the claim, he formally stated that "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compsensation Act."

But while that was thought to be the final order it was not. Indeed, a year and a half later the final Award now under review was a complete reversal and held that the Longshoremen's Act did apply. In review proceedings that Order was twice remanded to the Deputy Commissioner.[5] Except that there was an elaboration on essentially inconsequential details, the last Award of May 13, 1960, with no explanation for the change of decision, now declared the injury subject to the Longshoremen's Act and made an Award of death benefits. The record, as such, does

[4] United States Department of Labor, Bureau of Employees' Compensation.

[5] Apparently the Employer took an appeal under 33 USCA § 921(b) from the original Order of February 18, 1959. The Court remanded the case for further proceedings for the Deputy Commissioner "to reconsider the question of the situs of injury to be in Orange, Texas." By a modification award on July 30, 1959, the order was amended to show the situs to be Calcasieu Parish, Louisiana. The Order as thus amended, denying benefits for want of coverage, was again brought before the Court. On April 20, 1960, the Court again remanded it to the Deputy Commissioner "in order to permit him to make findings and conclusions in accordance with the facts and the law."

not spell out this change of heart. On the argument, however, there was general agreement by all counsel that this change in the Deputy Commissioner's decision was largely the result of a like change of view by the Bureau of Employees' Compensation concerning the underlying legal question of coverage for new construction. For reasons we later discuss, we regard this change as significant, not because either counsel or court consider this an intrusion into the independent adjudicatory functions of the Deputy Commissioner, but rather as a convincing demonstration that until these two cases[6] there was no serious contention that new construction work was covered.

While this problem has its genesis in the constitutional travail which gave birth to *Jensen,*[7] which despite severe criticism displays a remarkable tenacity so that each year sees fresh evidence of its continued vitality, *Kossick* v. *United Fruit Co.,* 1961, — U.S. —, — S. Ct. —, 6 L. Ed. 2d 56, our inquiry is no longer on that level. Now it is simply a question of statutory construction to determine, not how far Congress could have gone, or what Congress had to do, but rather what Congress did.[8] That question of statu-

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[6] See note 2, *supra.*

[7] *Southern Pacific Co.* v. *Jensen,* 1917, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[8] To the synopsis in *Flowers, supra,* 258 F. 2d 220 at 221, note 2, may be added that developed in some subsequent cases of this Court. *T. Smith & Sons, Inc.* v. *Williams,* 5 Cir., 1960, 275 F. 2d 397 at 398–401; *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 5 Cir., 1960, 274 F. 2d 794, 1960 AMC 1311, *modified on rehearing,* 279 F. 2d 75; *Noah* v. *Liberty Mutual Ins. Co.,* 5 Cir., 1959, 265 F. 2d 547, 1959 AMC 573, *overruled on rehearing en banc* 5 Cir., 267 F. 2d 218, 1959 AMC 2047; *Thibodeaux* v. *J. Ray McDermott & Co.,* 5 Cir., 1960, 276 F. 2d 42.

tory construction centers around § 903(a)[9] which defines the coverage of the Longshoremen's Act in terms which are jurisdictional in nature and impact *Crowell* v. *Benson,* 1932, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598. Precisely the question relates to prerequisite [2] "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

We start with an historic legal fact. In 1922 five years before the enactment of the Longshoremen's Act in response to the constitutionally unsuccessful efforts to adopt state compensation laws for maritime workers, the Supreme Court dealt with this very situation. With *Jensen* then, as now, a matter of everyday preoccupation, the Court held that Oregon could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters. *Grant Smith-Porter Ship Company* v. *Rohde,* 1922, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321. That the line was drawn precisely on uncompleted construction versus repair of a completed vessel is demonstrated overwhelmingly by contemporary cases upholding the supremacy of admiralty and prohibiting the application of state compensation acts to injuries received by those repairing existing vessels.[10] Rejecting the contention of the

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[9] The numbers in brackets [1] and [2] are inserted to emphasize the two distinctive separate jurisdictional requirements:

33 USCA § 903(a). "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if [1] the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if [2] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

[10] *John Baizley Iron Works* v. *Span,* 1930, 281 U.S. 222, 50 S. Ct. 306, 74 L. Ed. 819, 1930 AMC 755; *Robins Drydock &*

injured repairman that "when hurt he was doing work of a nature which had no direct relation to navigation or commerce; and to permit application of the state Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in *Grant Smith-Porter Ship Co.* v. *Rohde* * * *," the Court went on to pinpoint the very ground of distinction. "In *Grant Smith-Porter & Co.* v. *Rohde, supra,* claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation, and which had not become an instrumentality of commerce." *Baizley Iron Works* v. *Spun, supra,* 281 U.S. 222 at 230, 231.

And the line which the Court drew in the pre-1927 days was the line which Congress adopted in § 903(a), note 9, *supra.* The Court itself has said so in the plainest of terms, often repeated.[11] "The main impetus

Repair Co. v. *Dahl,* 1925, 266 U.S. 449, 45 S. Ct. 157, 69 L. Ed. 372, 1925 AMC 182; *Great Lakes Dredge & Drydock Co.* v. *Kierejewski,* 1923, 261 U.S. 479, 43 S. Ct. 418, 67 L. Ed. 756, 1923 AMC 441; *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 1924, 226 U.S. 171, 45 S. Ct. 39, 69 L. Ed. 228, 1924 AMC 1539; *Messel* v. *Foundation Co.,* 1927, 274 U.S. 427, 47 S. Ct. 695, 71 L. Ed. 1135, 1927 AMC 1047.

[11] In *Davis* v. *Department of Labor of Washington,* 1942, 317 U.S. 249 at 256, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, the Court stated: "In our decision in *Parker* v. *Motor Boat Sales* * * * we held that Congress has by the Longshoremen's Act accepted the *Jensen* line of demarcation between state and federal jurisdiction."

Even more recently in *Pennsylvania Ry. Co.* v. *O'Rourke,* 1952, 344 U.S. 334, 73 S. Ct. 302, 97 L. Ed. 367, 1953 AMC 237, it first stated, "This Act and the Jones Act provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation." The Court went on to declare: "A quarter of a century of experience has not caused Congress to change the plan. The *Jensen* line of demarcation between state and federal jurisdiction has been accepted." 344 U.S. 334 at 337.

for the longshoremen's * * * Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 1941, 314 U.S. 244 at 250, 62 S. Ct. 221, 86 L. Ed. 184, 1942 AMC 1.

Of course in this analysis we may not ignore the Twilight Zone concept announced by *Davis, supra.* In effect it holds that where it is difficult to ascertain what the line is, or on which side of any such assumed line the facts put a particular case, "an injured waterfront employee" was given "an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred." *Hahn* v. *Ross Island Sand & Gravel Co.*, 1959, 358 U.S. 252 at 273, 79 S. Ct. 266, 3 L. Ed. 2d 292. But neither *Davis* nor *Moore* [12] nor *Baskin* [13] were intended to make everything twilight merely because the injury occurred

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[12] Moore's case, 1948, 323 Mass. 162, 80 N.E. 2d 478, 1948 AMC 1862, affirmed per curiam, sub nom. *Bethlehem Steel Co.* v. *Moore*, 1948, 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417.

[13] *Baskin* v. *Industrial Accident Commission*, 1949, 338 U.S. 854, 70 S. Ct. 99, 94 L. Ed. 523, *reversing, per curiam*, 89 Cal. App. 2d 632, 201 Pac. 2d 549; *on remand to the state court*, 97 Cal. App. 2d 257, 217 Pac. 2d 733, *affirmed per curiam, Kaiser Co., Inc.* v. *Baskin*, 1950, 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

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near the waterfront to one who worked in, on, under or around it. The Twilight Zone concept was "devised to solve cases in, not to create, the twilight." *Flowers* v. *Travelers Ins. Co., supra,* 258 F. 2d at 228. Indeed, *Davis* properly understood is a recognition that there are *some* activities and some areas in which the *Jensen* line is clear and distinct. As to those the command of Congress is emphatic: those on the "admiralty" side are exclusively covered by the Longshoremen's Act; those on the "maritime but local" [14] side are state.

There is here more than the normal compulsion to heed the congressional command simply because it is the law. Here there is an imperative necessity. All—courts, judges, counsel, employers and employees in the industrial maritime field, insurers and marine underwriters—deplore the uncertainty in this problem. Recognized, of course, is the inescapable fact that from the nature of this overlapping of state and federal sovereignty, the problem at times is serious and substantial and, like Mordecai at the Gate, simply will not go away. But in those areas—rare as they might be—in which there is clarity, in which the line is clearly drawn, in which it may be said with some competent assurance that it is either one or the other, effectual enforcement of the socially desirable aim of securing a speedy determinable money indemnity under the operation of automatic self-executing [15] compensation statutes requires that courts have the re-

[14] The *Jensen* problem does not arise unless there is a conjunction of (1) an injury and (2) its occurrence on navigable waters. Where the injuries occur on land or what is deemed an extension of land, the maritime law has no application at all. *State Industrial Commission* v. *Nordenholt Corp.*, 1922, 259 U.S. 263 at 275–76, 42 S. Ct. 473, 66 L. Ed. 933.

[15] We have several times outlined the self-executing nature of the Longshoremen's Act. *Flowers* v. *Travelers Ins. Co.*,

sourcefulness to ascertain, and when ascertained, the fortitude to stand by the declaration of an identifiable line.

Such considerations have cut a large figure in the disposition this Court has made in two well-defined areas. Where from contemporary action by state courts in the maritime states of this Circuit the pre-existing certainty was imperiled by the beguiling appeal of a free-wheeling election or the assertion that what had been clear was now Twilight, this Court, not without some travail of its own, hewed to the line. Longshoremen, loading or unloading vessels on navigable waters were restored once and for all to the place where Jensen put them. *Noah* v. *Liberty Mutual Ins. Co., supra,* note 8. This stand has more than restored symmetry within the federal establishment of this Circuit. It has, without a doubt, been a substantial factor in the decisions of the state courts. If federal courts who are charged primarily with the immediate responsibility of elucidating the statutory and constitutional principles which inhere in this acute problem of federalism stand fast, it encourages, if not assures, a cohesive, consistent, harmonious treatment by our counterparts in the state judiciaries. Thus, for example, did the confidence in the ultimate rightness of the decision of Louisiana courts, expressed without reservation in *T. Smith & Son, Inc.* v. *Williams,* 5 Cir., *supra,* 275 F. 2d 397, turn out to be well founded. This was accomplished without the aid of the much sought for Federal injunction against prosecution in the state court of claims under the Louisiana Workmen's Compensation Act or the neces-

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supra, 258 F. 2d 220 at 225–27; *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 5 Cir., 1960, 274 F. 2d 794 at 799–801; and *T. Smith & Son, Inc.* v. *Williams*, *supra*, 275 F. 2d 397 at 400, note 11.

sity or artful constructions of the anti-injunction statute, 28 USCA § 2283. Louisiana has now spoken in terms as positive as *Noah*. Longshoremen are not in the Twilight. Longshoremen are in the federal area only. The Louisiana State Compensation Act may not validly apply to them. *Ellis* v. *Travelers Ins. Co.*, 1961, —— La. ——, 129 So. 2d 729; consolidated with *William Stepter* v. *T. Smith & Son, Inc.*, 1961, — La. —, 129 So. 2d 740, affirming the Court of Appeals, 123 So. 2d 780 and 788, respectively.

Likewise, in the face of some state court decisions which we have expressly declined to approve or follow, have we spoken in positive terms as to ship repairers. A ship repairer is not in the Twilight. He is in the federal domain. The State Act may not validly apply. *Flowers* v. *Travelers Ins. Co., supra,* 258 F. 2d 220.

It may seem to be unimportant that a restricted category of workers on new construction should be classified so sharply. But it is of such stuff that the certainty so badly needed in the routine operation of any compensation program will come. The converse is true. The moment what has been thought to be daylight or dark now becomes Twilight, the whole process becomes encumbered with the collateral and disruptive controversy which comes to an end authoritatively only after a long struggle culminating in a *Noah* or a *Flowers* decision.

The Supreme Court drew the line. For those working on uncompleted vessels afloat state compensation acts may validly apply. Congress adopted that line in § 903(a). There is no shadow. There is no obscurity. There is no uncertainty. It is as clear as it was in 1922 that such injuries are for state compensation.

None of the arguments offered to overcome this simple, but positive, lesson of history in action is of any merit. The main contention is that *Grant Smith-Porter Co.* was a "maritime but local" case. Two things are then asserted. The first is that the legislative history, meager and scarce as it is on this point,[16] made no reference to the "local concern" doctrine. This rests in part on the fact that the Committee Report in its statement that mariime workers are "unfortunately * * * excluded from" state laws and that the "Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation" cited, in addition to *Jensen,* only the two cases holding Congress could not adapt state legislation.[17] That, it is urged, demonstrates that Congress was not legislating with the other cases in mind. But the Supreme Court has not read the legislative history that narrowly (see note 11, *supra* and appended text). When reference was made to *Jensen,* Congress thought, just as do judges, courts and lawyers today, of the whole thing turned loose by that auspicious doctrine. Part of that struggle, inherently part and parcel of the compelling supremacy of the admiralty in the areas where uniformity was essential, was the reflex of that—the area in which application of local laws would not work any "material prejudice to the general maritime law," *Western Fuel Co.* v. *Garcia,* 1921, 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

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[16] See the Senate Judiciary Committee Report, S.R. 69 Cong. 1st Sess., Vol. 3, Rep. 973, p. 916; and H.R. 1767, 69 Cong. 2nd Sess., p. 19.

[17] These were *Knickerbocker Ice Co.* v. *Stewart,* 1920, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834; *State of Washington* v. *W. C. Dawson & Co.,* 1924, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646, 1924 AMC 403.

That concept of maritime but local is still valid.[18] The problem is all wrapped up together. The name *Jensen* is a shorthand abbreviation that embraces all. This is manifest from the very recent declaration by the Court in *Kossick* v. *United Fruit Co.*, 1961, — U.S. —, — S. Ct. —, 6 L. Ed. 2d 56 at 62, — AMC —. "This brings us, then, to the remaining, and what we believe is, the controlling question: whether the alleged contract, through maritime, is 'maritime and local,' *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242, * * * in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 * * *." And in the context of this compensation struggle, like language was used in *Hahn* v. *Ross Island Sand & Gravel Co., supra*, 358 U.S. 272. Of *Davis* the Court said, "* * * we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitation of *Southern P. Co.* v. *Jensen* * * *." In view of these strong contemporary recognitions of the vitality of the maritime but local concept and our present "clear duty to consider carefully what the law is on this important and far-reaching question," *River Terminals Corp.* v. *Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922 at 925, 1958 AMC 1534, *affirmed and remanded*, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 AMC 1631; 274 F. 2d 36, 1960 AMC 2064, expressions in some of our prior cases cannot be controlling. In several it has been said or implied that the consequence of the enactment in 1927 of the Longshoremen's Act was a congressional declaration that

[18] See note 14, *supra*.

"maritime but local" no longer applied. The reasoning essentially was that by virtue of the Longshoremen's Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." *Continental Casualty Co.* v. *Lawson*, 5 Cir., 1933, 64 F. 2d 802 at 805, 1933 AMC 794. At another time it was phrased this way. "No ground should be yielded to state jurisdiction in cases falling within the principle of the *Jensen* case * * *," *De Bardeleben Coal Co.* v. *Henderson, supra*, 142 F. 2d 481 at 484. But as the recent cases show without doubt, this ignores element [2], see note 9, *supra*, of the coverage clause. That was made plain in *Davis, supra*. After reviewing the unsuccessful efforts of Congress to adopt state compensation acts, it said of the Longshoremen's Act: "Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'" 317 U.S. 249 at 252–53. And *O'Rourke* and *Hahn* are fresh reminders that element [2] makes the inquiry indispensable. Moreover that inquiry, when made, ultimately has to be in the classic terms embodied in the "maritime but local" formula.[19]

This analysis disposes, at the same time, of all of the drydock or marine railway cases[20] even though

[19] In *Davis* the formula was translated into these terms: "* * * It must be remembered that under the *Jensen* hypothesis, basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law?" *Davis* v. *Department of Labor, supra*, 317 U.S. 249 at 254.

[20] See from this Court: *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 1939, 101 F. 2d 732, 1939 AMC 129; *Massachusetts Bonding & Ins. Co.* v. *Lawson*, 5 Cir., 1945, 149 F. 2d 853, 1945 AMC 878; *Avondale Marine Ways* v. *Henderson*, 5 Cir., 1953,

plausible arguments from analogy may be constructed that if a marine railway on land is within the coverage, a floating uncompleted hull should likewise be. But these cases do not overcome the categorical pre-1927 holding, adopted by Congress in § 903(a), that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be "validly * * * provided by state law."

Nor does *O'Rourke, supra,* require any different result. We pointed out in *Flowers* that this case in the resolution of some of these problems "has, in our judgment, been given altogether too little attention," 258 F. 2d 220 at 223. The case, we stated, "added the further and entirely new concept that where coverage of § 903(a) is applicable, the exclusive liability of § 905 does not depend on the nature or character of the work being done by the injured employee as long as (1) that injury occurs on navigable waters and (2) the employer is such a person '*any* of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * *,' § 902(4)." 258 F. 2d 220 at 224. But that does not come into play until it is first determined whether the case is within § 903(a) and that requires a finding under element [2], see note 9, supra.

As a final thrust it is then insisted that even though "maritime but local" still survives, this is a Twilight case under *Davis.* But what, apart from these very decisions of the two Deputy Commissioners affirmed

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201 F. 2d 437, 1953 AMC 432, *affirmed*, 346 U.S. 366, 74 S. Ct. 100, 98 L. Ed. 77, 1953 AMC 1990. Also from other Circuits, *United States Casualty Co.* v. *Taylor*, 4 Cir., 1933, 64 F. 2d 521, 1933 AMC 1200, no longer followed, see *Travelers Ins. Co.* v. *McManigal*, 4 Cir., 1944, 139 F. 2d 949, 1944 AMC 377, and *Newport News Shipbuilding & Drydock Co.* v. *O'Hearne*, 4 Cir., 1951, 192 F. 2d 968; *Western Boat Bldg. Co.* v. *O'Leary*, 9 Cir., 1952, 198 F. 2d 409, 1952 AMC 1639.

by two District Courts, brings about the haze of uncertainty? It was clear enough for the Deputy Commissioner to first rule that "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's * * * Act." For this February 1959 declaration the Administrator acting within the confines of the Fifth Circuit had some fairly substantial, if not infallible, grounds in the expressions which we made in 1958 in *Flowers*. To acknowledge that this statement may perhaps properly be characterized as dicta does not detract from the fact that this Court in drawing the line for ship repairers thought it necessary to consider that group in contrast to those engaged in new construction and in doing so used very positive language. "In contrast to" repair of a completed vessel, we declared, "work on an uncompleted hull before it has become a ship is not under Federal coverage and is, on the contrary, under State jurisdiction: *Grant Smith-Porter Ship Co.* v. *Rohde* * * *," 258 F. 2d 220 at 222, note 5.[21]

It is surprising, indeed, that with *Grant Smith-Porter Co.* still very much alive in its 49th year and the Longshoremen's Act now in its 4th decade of operations, a thing as well settled as this has suddenly become confused. *Davis* with all of its "Theoretic illogic," 317 U.S. 247 at 259 (concurring) is, as the Court's decisions reflect, "a practical solution to a practical problem," 358 U.S. 272 at 274 (dissenting).

[21] It would be doctrinaire to quibble over the phrase "before it has become a ship" as does the Deputy Commissioner's brief in reliance on *Tucker* v. *Alexandroff*, 1902, 183 U.S. 424, 22 S. Ct. 195, 46 L. Ed. 264. In any event, in a situation involving the nature of the building of a ship, in contrast to the repair of an existing vessel, the Supreme Court sharply restricted the *Tucker* case. *Thames Towboat Co.* v. *Schooner Francis McDonald*, 1920, 254 U.S. 242 at 244, 41 S. Ct. 65, 65 L. Ed. 2d 245.

It does not serve that function if it is used as a basis for finding new uncertainty, of creating, not solving, doubt.

It is no answer to urge that the distinction at times conceivably may produce results that are extremely fine. That is the inevitable likelihood in dealing with strict jurisdictional lines. The Constitution at times sets up a barrier at the water's edge. It probably does not make much sense from an operational standpoint that a longshoreman injured while handling one end of a bale of cotton on the dock has a state remedy only whereas his counterpart injured when the other end drops while he stands with both feet on the ship's deck must go the federal route. Nor is it any more appealing that a welder fabricating a repair fitting on the dock adjacent to a completed ship is a state case whereas a fellow welder on the ship's deck working on precisely the same fitting must look exclusively to the Longshoremen's Act.

We know by now that nothing written in this field is the last word. All it can be is "the latest word." *T. Smith & Son, Inc.* v. *Williams, supra,* 275 F. 2d 397 at 407. Until there is a further word, this Court, for one at least, has three clear-cut categories: (1) longshoremen working on a ship and (2) repairmen working on a completed vessel are under the Longshoremen's Act; (3) persons working on an uncompleted vessel afloat but under construction are covered by the state act. Thus do we afford to "these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation * * *"[22] by a proceeding which is certain and swift and virtually self-executing. The congressional policy reflected in element [2] of

[22] S.R. 69th Cong., 1st Sess., Vol. 3, Rep. 973, p. 916; see note 16, supra.

§ 903(a) has freed this remedy for these workers from the agony of case-by-case adjudication with the portentous constitutional overtones[23] involved in nearly every such claim and which, for scholars and historians may be interesting, if not decisive, but which hardly offer a solution to the pressing, immediate, urgent problem of the injured worker, his employer and its insurance carrier.

The compensation order was not in accordance with law and must be set aside. 33 USCA § 921(b).

Reversed and rendered.

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[23] This is no better illustrated than in the complex field of maritime death actions. See *Thibodeaux* v. *J. Ray McDermott & Co.*, 5 Cir., 1960, 276 F. 2d 42 at 47, note 6, and *Emerson* v. *Holloway Concrete Products Co.*, 5 Cir., 1960, 282 F. 2d 271 at 281, notes 10 and 11 (dissenting) for a summary of the shifting position and alignment of the several Justices; and see Currie, *Federalism and Admiralty, The Devil's Own Mess*, 1960, The Supreme Court Review 158; Baer, *At Sea With The United States Supreme Court*, 38 N.C. L. Rev. 307 (1960).

In the United States Court of Appeals for the Fifth Circuit

No. 18695

AVONDALE SHIPYARDS, INC., APPELLANT

v.

P. J. DONOVAN, DEPUTY COMMISSIONER SEVENTH COMPENSATION DISTRICT, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, AND MINUS AIZEN, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(July 13, 1961)

Before CAMERON, BROWN and WISDOM, *Circuit Judges*

BROWN, *Circuit Judge:* This case presents for decision the identical question this day decided in *The Travelers Ins. Co.* v. *Calbeck, Deputy Commissioner,* 5 Cir., 1961, — F. 2d —, — AMC — [No. 18802], whether injuries received by a person working on an uncompleted vessel, launched and afloat but still under construction, are covered under the State or the Federal Longshoremen's Act.

The facts are not significantly different. The Employer, Avondale Marine Ways, Inc., has two large shipyards and regularly performs new construction

work and repair work. Generally in the Employer's large labor force the work performed by a particular employee was primarily one rather than the other. Occasionally an employee would perform the other. The injured employee, however, worked regularly and solely in new construction. The injuries were received on August 11, 1956, while the employee was working as a welder on an uncompleted elevated deck drilling barge. The hull had been launched July 26, 1956, but the vessel was not completed and delivered until November 17, 1956. By stipulation the barge, at the time of the accident, was 57% complete based both on probable dollar cost and estimated man hours of work.

Unlike the *Calbeck* case only one Award was issued here. On January 27, 1960, Deputy Commissioner Donovan entered an Award of compensation benefits under the Longshoremen's Act. This was, of course, subsequent to the two Orders of Deputy Commissioner Calbeck in the other similar case then pending before the Bureau of Employees' Compensation, but it was prior to the District Court's Order of April 20, 1960, which remanded the matter for further proceedings and resulted in a complete about-face. See note 5 in *Calbeck,* — F. 2d — at —. The uncertainty and confusion was, therefore, being generated by the two cases themselves.

As in the other case, we hold that injuries to such a worker may validly be covered by the State Compensation Act. Consequently, the Order of the Deputy Commissioner must be set aside as not in accordance with law, 33 USCA § 921(b).

This makes it unnecessary to pass on the additional contention of the Employer that payments aggregating several thousand dollars for compensation and medical expense ostensibly made under the Louisiana

Act constituted such an administrative determination as to be within that aspect of *Davis* v. *Department of Labor*, 1942, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653.

Reversed and rendered.

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